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No. _____

In The

Supreme Court of the United States

October Term, 1993

Tom Metzger, John Metzger, and
White Aryan Resistance,

Petitioners,

v.

Engedaw Berhanu, Personal Representative
of the Estate of Mulugeta Seraw, Deceased,

Respondent.

**Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of Oregon**

PETITION FOR WRIT OF CERTIORARI

CAUSE Foundation, Inc.
Kirk D. Lyons
Attorney at Law
P.O. Box 1235
Black Mountain, NC 28711
(704) 669-5189

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

In *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967) this Court held that a party to litigation can only be shown to have waived that person's First Amendment rights in circumstances which show such a waiver by "clear and compelling" evidence.

The question presented herein is whether the Court of Appeals of the State of Oregon properly found the Petitioners to have waived any defense based upon their First Amendment rights to the claims made against them by the Respondent despite the fact that there is no evidence in the record of this case that any of the Petitioners knowingly, intelligently and voluntarily waived their First Amendment rights and defenses and regardless of the circumstance that the Petitioners, who were proceeding without the benefit of counsel, did continuously move to dismiss the action at issue on constitutional grounds.

LIST OF PARTIES

Tom Metzger
John Metzger

White Aryan Resistance, an Unincorporated Association, and It's Members, Agents, Servants, Employees and Assigns

Engedaw Berhanu, Personal Representative of the Estate of Mulugeta Seraw, Deceased

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PETITION FOR WRIT OF CERTIORARI

The Petitioners Tom Metzger, John Metzger and the unincorporated association of White Aryan Resistance, pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon, entered in the above styled proceeding on April 14, 1993. That court denied a timely filed motion for reconsideration on September 1, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon has been both officially and unofficially reported in the case of *Engedaw Berhanu, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Respondent v. Tom Metzger, individually and as President of White Aryan Resistance, an unincorporated association; John Metzger, Appellants, and Kenneth Mieske and Kyle Brewster, Defendants*, 119 Or. App. 175, 850 P. 2d 373 (Or. App. 1993)

This opinion is reprinted in the Appendix hereto, page one (1) of the Appendix, infra. Neither Kenneth Mieske nor Kyle Brewster were parties to the appeal in the Court of Appeals and they are not parties to this Petition for a Writ of Certiorari.

The order of that court dated September 1, 1993 denying reconsideration is reprinted in the Appendix, page 8 of the Appendix, infra.

The order of the Supreme Court of the State of Oregon dated November 16, 1993 denying the Petitioners' petition for review in that court is reprinted in the Appendix hereto, page 10, of the Appendix, infra.

JURISDICTION

Engedaw Berhanu, Representative of the Estate of Mulugeta Seraw, Deceased, filed a civil action in the Circuit Court of the State of Oregon for the County of Multnomah against the Petitioners herein on or about April 4, 1990 pursuant to Oregon's wrongful death statute, § 30.020 of Oregon's Revised Statutes. The Petitioners

filed their first answer to the Respondent's initial complaint on or about December 30, 1989 wherein they denied all of the averments of said complaint and specifically alleged in their *Fourth Affirmative Defense To All Causes of Action* that "The actions of these answering defendants is protected action (sic) under the United States Constitution and the Constitution of the State of Oregon". Later in an answer to the Respondent's amended complaint which was filed by the Petitioners Tom Metzger, John Metzger and White Aryan Resistance, they again denied the material allegations of that pleading and again invoked their constitutional rights in that answer in their *Fifth Affirmative Defense To All Causes of Action*. The answer to the amended complaint was filed in the Multnomah County circuit court on or about April 27, 1990.

After the discovery process in this case had been completed and after the disposition of various pretrial motions, this case duly went to trial in Multnomah County circuit court. After proceedings which lasted for several days the trial jury returned a verdict for the Respondent in the amount of $475,469.00 in economic damages and two million dollars in non-economic damages. These damages were apportioned against the Petitioners herein and several other defendants but each of the defendants to the lawsuit was to be held jointly and severally liable for the payment of this portion of the judgment. In addition punitive damages were assessed by the verdict against each of the Petitioners as follows: Tom Metzger, five million dollars, John Metzger, one million dollars and White Aryan Resistance, three million dollars.

The verdict was duly made the judgment of the trial court and after that court disposed of various post-trial motions, the Petitioners appealed this judgment to the Court of Appeals of the State of Oregon, the appellate court having primary jurisdiction over this matter. That court affirmed the judgment of the trial court on April 14, 1993. It denied a timely filed petition for reconsideration on September 1, 1993. The Supreme Court of the State of Oregon denied a timely filed petition for review of the decision of the court of appeals on November 16, 1993.

On February 3, 1994, Justice Sandra Day O'Connor ordered that the time for filing this petition for a writ of certiorari be extended up to and including March 15, 1994.

The jurisdiction of this Court to review the judgment of the Court of Appeals of the State of Oregon is invoked under 28 USC § 1257 (a).

STATUTES INVOLVED

U. S. Constitution, Amendment One

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition government for a redress of grievances.

U. S. Constitution, Amendment Fourteen, Section One

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

The Petitioner Tom Metzger is a long-time political activist who has been and who continues to be an unabashed and outspoken advocate of white interests and racial separation in the United States and throughout the entire world. He makes no secret of his belief that what he perceives to be the growing influence and presence in the United States of such groups as Blacks, Hispanics and Jews, particularly since the end of the Second World War, has been detrimental to the interests of the traditionally European derived, White majority population of this country.

Tom Metzger has forcefully expressed these views on many occasions and through many mediums. He initially achieved a high degree of public awareness of his beliefs and the manner in which he commonly expresses them when he received the Democratic Party's nomination for an unsuccessful run at a congressional seat in his hometown of San Diego, California in 1980. Since that time he has expressed his views in various publications and formats and has received widespread attention on account of a public access television program that he has produced and hosted called "Race and Reason".

Mr. Metzger voices his positions in a frequently acerbic, caustic and many would say even crude manner. Undoubtedly many of his publications and utterances

could be reasonably understood as expressing encouragement and approval of unspecified acts of violence against unidentified members of the ethnic and religious groups previously mentioned.

Throughout the 1980's the Petitioner Tom Metzger, who was eventually joined in his efforts by his son, the Petitioner John Metzger, tirelessly evangelized and proselytized for his racial and political convictions in word and in print. By the middle of that decade he was directing an increasing amount of his attention to disaffected working class youths of Caucasian extraction, particularly those located in the areas of the nation where the nonwhite and non-Christian ethnic and religious population was rapidly increasing through immigration and natural increase. He and his son were especially interested in galvanizing what have come to be known as "skinhead" youths, young people who have adopted an idiosyncratic manner of appearance and dress in order to call attention to their non-mainstream political and racial views. The umbrella organization that he created to reach these groups is the Aryan Youth Movement, a sub-group of the Petitioner herein, the unicorporated association known as White Aryan Resistance.

In the fall of 1988 the Petitioner John Metzger mailed a letter to Kenneth Mieske to introduce the Aryan Youth Movement to Eastside White Pride, a White separatist youth group in Portland, Oregon, of which Mieske was a member. The letter further notified Mieske that associates of the Aryan Youth Movement, including Dave Mazzella, had relocated to the Portland area, and Mr. Mieske could contact them.

During the time that he was associated with the Eastside White Pride group Mazzella encouraged the members to be more forceful in their White separatist activism and, undoubtedly and unfortunately, he made comments and speeches to the group and the members thereof wherein he expressed encouragement and approval of acts of violence against unspecified members of minority groups. It should be noted, however, that his advocacy of violence was confined to puerile, adolescent forms of in-your-face hooliganism ("kicking ass, etc.") which commonly consisted of the use of derogatory racial epithets and of acts of what would be considered to be simple assault and battery directed toward members of the targeted groups. There is absolutely no evidence in the record which indicates that either he or the other Petitioners herein ever expressly directed any person to utilize lethal, deadly force against any identifiable member of the disliked ethnic and religious groups.

During the early morning hours of November 13, 1988 Kenneth Mieske and another member of Eastside White Pride, Kyle Brewster, became involved in a fight with Mulugeta Seraw, an Ethiopian who was then residing in Portland, and others. In the course of the fight Seraw was killed, apparently when Mieske hit him in the head with a baseball bat. Mazzella was in no way directly associated with this attack when it occurred and he had not even been in the company of the assailants during the several hours leading up to this incident.

The Portland law enforcement authorities thoroughly investigated this matter and in the course of so doing they searched Mieske's residence. During this search they discovered numerous papers and leaflets published and

distributed by the Petitioner White Aryan Resistance. They also found the letter from the Petitioner John Metzger to Mieske.

Mazzella's alleged association with the Petitioners and his putatively incendiary activities with the Portland organization were the linchpins of the lawsuit which the Respondent filed against the Petitioners. The lawsuit generally claimed that the Petitioners were legally responsible for the death of Mr. Seraw because they had sent Mazzella to direct and influence the actions of members of Eastside White Pride. Mazzella, in turn, had incited Mieske and Brewster by means of his violent and inflammatory rhetoric and comments to kill Seraw. The most elementary understanding of this Court's First Amendment jurisprudence renders this basis of liability against the Petitioners extremely problematic and deserving of intense and searching judicial examination. Nevertheless, it was a theory that the Respondent through his attorneys very successfully argued in the trial court as noted above.

Undoubtedly one extremely important reason why the Respondent achieved such a resounding victory was that through the use of a San Diego County Superior Court restraining order issued at his behest the Respondent was able to "freeze" all of the real property assets of the Petitioners (ostensibly to prevent a quitclaim transfer of the real property to Mrs. Metzger), which totalled between fifty and one hundred thousand dollars in such a manner that the Petitioners were unable to retain an attorney in the forum where they were tried so far from their homes. Thus the Petitioners were left to defend this lawsuit on an *in propria persona* basis with whatever meager legal knowledge and skills they could muster in the

exigency of this situation. The implications of the necessity on their part of representing themselves upon their ability to protect their fundamental rights, particularly their rights to freedom of speech and association under the First Amendment, were and are obvious.

Notwithstanding their lack of counsel, the Petitioners did at the earliest opportunity contest the legal basis of the Respondent's suit by invoking their constitutional rights. As noted above in their answers all of the Petitioners stated that their respective actions were "protected action under the United States Constitution and the Constitution of the State of Oregon." Moreover, the Petitioners specifically brought their constitutionally based defense to the attention of the trial court by means of a pretrial motion to dismiss, which was peremptorily denied without comment by the presiding judge. At the conclusion of the presentation of evidence, the Petitioners, through the action of Tom Metzger, moved to dismiss the Respondent's cause of action stating that "I would just make a motion to dismiss the entire case. They haven't proved it. They haven't proved their case. They certainly haven't proved intent."

It is true that the Petitioners, who were obviously unlearned in the fundamental precept of trial practice that an objection, and specifically the legal principle underlying an objection, normally has to be explicitly stated for it to be efficacious, did not make specific reference to the rights of freedom of speech and association embodied in the First Amendment in the vast majority of the pertinent objections and exceptions that they made throughout the trial. However, in *Defendant Tom Metzger's*

Objections to Plaintiff's Requested Jury Instructions, a written document filed with the trial court, he disputed the Respondent's proposed jury charge number 39 and in so doing made direct reference to the protection that should have been afforded to him by the free speech guarantee of the First Amendment. In a subpart explicitly headed "First Amendment", he averred that "Plaintiff dangerously misreads *N.A.A.C.P. v. Claiborne Hardware*. The last sentence of the instruction is wrong. Words alone may not be used to impose liability; they can only be used in conjuction (sic) with other acts."

Given the fact that the Oregon chapter of the American Civil Liberties Union also filed an *amicus curiae* brief disputing many fundamental aspects of the Respondent's cause of action on First Amendment grounds, the Petitioners certainly did enough to apprise the trial court judge, and any other reviewing tribunal in the state of Oregon, of the fundamental and basic issues of freedom of speech and freedom of association that were involved in this case. Only a judge who could have been totally ignorant of the law pertaining to this subject, a proposition which is contrary to the fundamental evidentiary precept that a judge is presumed to know the law, or jurists who were for reasons of their own consciously avoiding the obvious and clear implications of the First Amendment in this case, could fail to acknowledge this conclusion.

After the judgment at issue was rendered against them and upon their taking this appeal to the Court of Appeals of the State of Oregon, the Petitioners were far

more specific and precise in raising their First Amendment freedom of speech and freedom of association arguments. Significantly this was the first juncture in these proceedings when they had been able to obtain the assistance of competent and knowledgeable counsel in preparing and presenting their legal arguments. In their fourth assignment of error in their brief to the court of appeals they argued as follows:

> I. THE CALIFORNIA DEFENDANTS CANNOT CONSTITUTIONALLY BE HELD LIABLE FOR SERAW'S WRONGFUL DEATH BECAUSE THE RECORD REFLECTS NO CLEAR PROOF THAT THEY AUTHORIZED ANY AGENT TO INCITE OR ENGAGE IN VIOLENT ACTS AND BECAUSE THEIR PUTATIVE AGENT DID NOT IN FACT INCITE THE ACTIONS WHICH LED TO SERAW'S DEATH.
>
> A. Even assuming that they authorized Mazzella to incite or engage in violent action, the California Defendants cannot be held liable for Seraw's wrongful death because Mazzella did not, in fact, incite the actions which caused Seraw's death.
>
> B. The California Defendants cannot be held liable for Seraw's wrongful death because the record reflects no clear proof that they authorized Mazzella or any other agent to incite or engage in violent acts.

In support of their Fourth Assignment of Error, the Petitioners included in their brief encyclopedic discussion of First Amendment law as originally expounded and explicated by this Court in their attempt to show that they could not be held liable for Seraw's death in a

manner consistent with the basic jurisprudence concerning freedom of speech in the United States. This extended argument undergirded virtually every other contention of error that the Petitioners made in their appeal to the Oregon appellate court.

Yet despite the fact that First Amendment considerations obviously permeated, indeed virtually saturated, this case the Court of Appeals refused to consider the Petitioner's constitutional arguments because that body held that these arguments had not been properly raised in the trial court. "We conclude that defendants did not preserve any claim of constitutional error regarding the two theories of liability for intentional misconduct." *Berhanu v. Metzger* at page 4 of the Appendix, infra. That court went on to say that it would not review the Petitioners' constitutional arguments concerning the reckless appointment of an agent basis of liability because of the procedural default on their part in regard to the intentional misconduct claims.

The Oregon appellate court further stated that it would not even consider these issues under a "plain error" standard of review. Clearly that Court was grasping at any means to avoid any carefully considered review of the substantial and weighty First Amendment freedom of speech and freedom of association issues which were and are involved in this action. It is the failure of that Court to review these matters which is the crux of the Petitioners' request for a writ of certiorari which is addressed to this honorable Court.

REASONS FOR GRANTING THE WRIT

Without question the political, social and racial ideology of the Petitioners is held in the greatest disrepute and opprobrium of any viewpoint that is expressed in the public arena of ideas today. Moreover, these Petitioners have aired their controversial beliefs on occasion in a most abrasive and abusive manner. Clearly the preservation of a reasonable degree of social harmony is not a value in which they believe; in fact, they clearly seek to encourage and foment racial, religious and ethnic discord.

That fact notwithstanding, the protections of the First Amendment to the United States Constitution are not circumscribed by what the vast majority of people or even by what a resounding consensus of the community believes is good, decent and moral. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v. Barnett*, 319 U.S. 624, 642 (1943). "(Speech) may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). "The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas." *Texas v. Johnson*, 491 U.S. 397, 418 (1989)

In accord with the broad and expansive protection that the Court has given to controversial speech, it has held that even the advocacy of unlawful, violent conduct is constitutionally protected so long as such speech does not amount to an incitement to imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The advocacy of such action at some indefinite and undesignated juncture in the future is neither criminally nor civilly actionable. *Hess v. Indiana*, 414 U.S. 105 (1973).

This Court has further held that it is not enough that a speaker's words may have a tendency to prompt the hearer to engage in illegal conduct; they must explicitly advocate such conduct before they can be punished in any manner. *Noto v. United States*, 367 U.S. 290 (1961). An individual's endorsement and approval of violent conduct is itself constitutionally protected speech so long as the speaker was not criminally involved in the incident at issue. *Rankin v. McPherson*, 483 U.S. 378 (1987). And even if the questioned speech could arguably amount to an otherwise actionable incitement, the party who is seeking to have it punished either civilly or criminally must show that the disputed words and actions in fact caused the harm which is sought to be redressed. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Insofar as actual proof of a culpable incitement to imminent lawless action in circumstances where First Amendment freedom of speech and association concerns are clearly implicated, this Court has held that a "solidity of evidence" must be apparent before a given utterance can be said to have crossed the threshold from protected speech to illegal conduct which can be proscribed and punished. *Landmark Communications, Inc. v. Virginia*, 435

U.S. 829, 845 (1978). In order to apprise the Court of the fact that there are very real and substantial issues in this case as to whether the conduct of the Petitioners could in any manner be determined to be an actionable incitement or incitements, they have included in the appendix to this petition excerpts of the cross-examination of Dave Mazzella by the Petitioner Tom Metzger. (Appendix at page 12, infra) Mazzella was undoubtedly the most important witness who testified against the Petitioners at trial.

The purpose of this petition is not, however, to request that this Court finally adjudicate this case in light of the fundamental and basic principles of the right of free.om of speech and association. The Petitioners know that in light of the purported procedural defaults relied upon by the Court of Appeals of the State of Oregon in disposing of their appeal before that tribunal, this Court would now be unable to proceed to decide this case on its merits. Rather it is meaningful, complete and plenary review of their defenses based upon the First Amendment guarantees of freedom of speech and association in the appropriate appellate forum which they seek to obtain from this Court.

A necessary concomitant to a party's right to protection under the First Amendment freedom of speech clause in a case of this kind is the right to effective and complete judicial review of a party's defenses and privileges arising out of the amendment. Such review will usually and frequently occur in an appellate court with jurisdiction over the subject matter of the action. In consideration of the basic and fundamental rights involved, a reviewing court is constrained to conduct a thorough and

searching examination of the record in order to make sure that vital freedom of speech interests have been upheld and preserved. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). Judicial review in order to vindicate these important rights is therefore part and parcel of the rights themselves. *Mooney v. Holohan*, 294 U.S. 103, 113 (1938).

The Court of Appeals of the State of Oregon totally dispensed with any careful consideration of the Petitioners' First Amendment rights in denying their appeal on the grounds that the Petitioners had failed to comply with that State's "contemporaneous objection rule" in perfecting and completing their constitutionally based objections and exceptions to the totality of the Respondent's case and to various important aspects of it such as the Respondent's proposed jury instructions. In deciding the Petitioners' appeal in this manner, the Court of Appeals fundamentally erred because this Court has squarely held that the right to meaningful judicial review in a case of this kind does not depend upon the technicalities and vagaries of a party's compliance with a state made and promulgated contemporaneous objection requirement. Of course, the contemporaneous objection rule allows a reviewing court to hold a party's objection or exception to be ineffective in order to invoke appellate review because such an objection or exception did not precisely state and explicate the party's grounds or rationale therefor. Thus the rule commonly allows otherwise valid claims of error to be forfeited on appeal due to the negligence or ignorance of the law of the party seeking

review of a disputed action on the part of the trial court or the opposing party.

In contrast, this Court has firmly and unequivocally held that First Amendment rights of freedom on speech and association can only be relinquished by means of a knowing, intelligent and voluntary waiver of such rights. Thus the responsibility of protecting a party's basic First Amendment rights is one of the very few obligations that this Court has principally imposed on the judiciary or other analogous authority, much as it has made it the trial courts' obligation to assure that every accused in a serious criminal case is represented by counsel. The presiding judge in a civil proceeding such as the one at bar is consequently obliged to affirmatively step in and protect these rights, in the absence of waiver, even if that party is only dimly aware of his rights in this regard or indeed is totally unaware of them.

> . . . the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom". (cit) Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967)

The rights to freedom of expression and association vouchsafed by the First Amendment stand on a plane of importance analogous and equivalent to that of the right to counsel for the accused in a criminal case guaranteed

by the Sixth Amendment to the United States Constitution. Both the right to freedom of speech and the right to counsel in a criminal case are predicate, foundational rights upon which the proper invocation of other rights necessarily depends. Consequently, it is entirely appropriate to apply the same criteria for determining when First Amendment rights have been properly relinquished as are usually and commonly invoked in deciding the issue of whether or not a criminal accused has properly waived his right to counsel.

> It has been pointed out that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

There is absolutely nothing in the record of this case that even remotely indicates that any of the Petitioners waived their First Amendment rights, specifically their right to exacting judicial review of the question of whether or not the Respondent's cause of action violated these rights.

> In the present case, however, there was no guilty plea, and the return to the writ does not allege an affirmative waiver. . . . Presuming

> waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.

Carnley v. Cochran, 369 U.S. 506, 516 (1962)

In fact, there is every indication in the record that the individual Petitioners fully intended to assert their rights rather than to waive them. As has been noted, the First Amendment aspects of this case permeated the entire trial and it is simply disingenuous to argue that the presiding judge was not made aware of them. Given the fact that Tom Metzger and John Metzger were laymen who had been compelled to represent themselves in a complicated legal procedure without the benefit of counsel, then surely it must be concluded that they did more than enough to apprise the trial court judge of the fact that there were weighty First Amendment issues to be considered by that jurist in making a final determination of their liability.

This Court has held that there is no necessity that a fundamental right be asserted in some specific, talismanic formula before the court, tribunal or other deliberative body before which it is invoked is required to take cognizance of the right before proceeding further. In *Emspak v. United States*, 349 U.S. 190 (1955) the petitioner therein had sought to invoke his right to be protected against compelled self-incrimination before the now defunct House Committee on Un-American Activities. In refusing to answer certain questions put to him by the committee,

he expressed his reliance on "primarily the First Amendment, supplemented by the Fifth".[1]

A lower federal appellate court, the United States Court of Appeals for the District of Columbia Circuit held that Emspak had failed to properly assert his self-incrimination right in that he had neglected to make an explicit and obvious reference to this right in refusing to answer queries put to him by the congressional committee. As a consequence that court held that he could be lawfully prosecuted for refusing to answer questions propounded to him by a congressional committee.

This Court disagreed with this decision by the appellate tribunal and ruled that Mr. Emspak had sufficiently invoked his right to be free from compelled self-incrimination in the circumstances in which the committee had sought to interrogate him. Thus the Court ruled that his less than precise and somewhat inexact assertion of this right was clearly sufficient to preclude a finding of waiver on his part.

> . . . no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an

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[1] The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

> objection stated in language that a committee may reasonably be expected to understand as an attempt to invoke the privilege. . . . (A)n objection that is sufficiently clear to reveal a probable intention to invoke the privilege cannot be ignored merely because it is not phrased in an orthodox manner. . . . (I)t should be noted that a committee is not obliged to either accept an ambiguous constitutional claim the very moment it is first presented. The way is always open for the committee to inquire into the nature of the claim before making the ruling . . . Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution. Waiver of constitutional rights is not lightly to be inferred. A witness cannot be properly held after claim to have waived his privilege upon vague and uncertain evidence.

349 U.S. 194-196

The principle of law set forth and explicated in *Emspak* is, of course, fully applicable to the situation presented *sub judice*. As in *Emspak*, the Petitioners, who were unlearned in the technicalities of the law and trial procedure, attempted to inexactly and unartfully invoke and assert a fundamental right in their behalf. Like the appellate court in that case, the reviewing court herein held that the parties seeking to assert the right had waived it because they had referred to it in a less than precise manner. However this Court has held that in circumstances of this kind, when the protection of fundamental rights are involved, jurists should seek to fulfill the demands of elementary and fundamental justice rather than to rely on obscure procedural niceties in an

effort to avoid deciding hard cases. In short, reviewing courts should not be looking for ways in which a party can be held to have mistakenly and inadvertently given up a cherished constitutional right.

The Court's holding on this issue is fully consistent with the precept of law which holds that "When a constitutional right is vested in a party and there is doubt as to whether he waived it, such doubt should be resolved in his favor" 28 *Am Jur* 2nd, "Estoppel and Waiver", § 164, p. 850. The conclusion follows that even an ambiguous and imprecise assertion of a fundamental right, such as the right to freedom of speech, like the right to be protected from compelled self-incrimination, is enough to preclude a finding of a knowing, intelligent, and voluntary waiver of the right.

CONCLUSION

Undoubtedly the easiest way for a reviewing court to decide a controversial case, particularly a case wherein it suspects that fundamental principles of law may very well impel it to side with an unpopular cause or party, is to affirm it on some procedural or technical ground, thereby effectively consigning the whole case to the "memory hole". This inclination notwithstanding, the weighty concerns inherent in basic and fundamental First Amendment values simply do not allow a court such as the Court of Appeals of the State of Oregon to take this course of action in a case of this kind. This Court has spoken with unmistakable clarity and precision on this issue. The Oregon appellate court was simply wrong in

deciding the Petitioners' case in the manner in which it did. For this reason, this Court should grant this Petition for a Writ of Certiorari, reverse the decision of the Court of Appeals for the State of Oregon and remand this case back to that court for a decision on the merits of the Petitioners' constitutionally based claims and defenses.

This 11th day of March, 1994.

Respectfully submitted,

CAUSE Foundation, Inc.
Kirk D. Lyons
Attorney at Law
P.O. Box 1235
Black Mountain, NC 28711
(704) 669-5189

Engedaw BERHANU, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Respondent,

v.

Tom METZGER, individually and as President of the White Aryan Resistance, White Aryan Resistance, an unincorporated association; John Metzger, Appellants,

and

Kenneth Mieske and Kyle Brewster, Defendants.

A89-11-07007; CA A67833.

Court of Appeals of Oregon.

Argued and Submitted Dec. 16, 1992.

Decided April 14, 1993.

Wrongful death action was brought in connection with an alleged murder. The Circuit Court, Multnomah County, Ancer L. Haggerty, J., entered judgment on jury verdict for claimant and appeal was taken. The Court of Appeals, Warren, P.J., held that: (1) no review would be made of jury instructions which had not been objected to at trial; (2) claims of constitutional error regarding theories of liability for intentional misconduct had not been preserved; and (3) proper foundation had not been laid for testimony of witness which was excluded.

Affirmed.

Reed Lee, Chicago, IL, argued the cause for appellants. With him on the briefs were Michael Null and

Michael Null & Associates, Chicago, IL, and Patricia Campbell, Salem, Oregon.

Elden Rosenthal, Portland, argued the cause for respondent. With him on the brief were Rosenthal & Greene, Portland, Morris Dees, J. Richard Cohen and Southern Poverty Law Center, Montgomery, AL, and Jeffrey Sinensky, New York City.

Before WARREN, P.J., and RICHARDSON, C.J., and EDMONDS, J.

WARREN, Presiding Judge.

Defendants[1] appeal from a judgment entered on a jury verdict for plaintiff. We affirm.

This case arises from the 1988 murder of Mulugeta Seraw in Portland. Plaintiff, the personal representative of Seraw's estate, brought this action for wrongful death. Defendants represented themselves at the trial. The court submitted the case to the jury on three theories. The first two are theories of intentional wrongful death; the third is based on recklessness. The jury, in a special verdict, found for plaintiff on each theory. It made a single award of damages.

Plaintiff first argues that none of the claimed errors is preserved and that, therefore, we should not consider them. With the exception of a motion to dismiss, he is

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[1] There were five defendants at trial: California defendants Tom Metzger, John Metzger and the White Aryan Resistance (WAR) (defendants) are parties to this appeal. Oregon defendants Mieske and Brewster have filed a separate appeal, which we have affirmed without opinion this date.

correct. Assignments 1, 5 and 8 challenge the questions submitted to the jury on the special verdict form. Defendants did not object to the submission of the verdict form, and we will not consider any claimed errors as to it. *U.S. National Bank of Oregon v. Zellner,* 101 Or.App. 98, 104, 789 P.2d 670, *rev. den.* 310 Or. 122, 794 P.2d 794 (1990).

Assignments 2, 4, 6 and 7 challenge jury instructions to which defendants did not object or take exception, and we will not review them. ORCP 59H. In assignment 9, defendants assert that the trial court should have given a certain instruction on civil conspiracy. They did not request the instruction that they now assert the court should have given. We will not consider the assignment. *See Roberts v. Mitchell Bros.,* 289 Or. 119, 129, 611 P.2d 297 (1980).

Defendants' third assignment challenges the denial of their motions to dismiss and motion for judgment notwithstanding the verdict. The motion to dismiss on constitutional grounds is discussed below. Defendants also moved "to dismiss" at the end of plaintiff's evidence. That motion was directed to the sufficiency of the evidence, and we treat it as a motion for directed verdict. ORCP 60. There was evidence to support plaintiff's theories of the case. The trial court did not err in denying the motion.

Defendants also claim that the trial court erred in denying their motion for judgment notwithstanding the verdict. Denial of that motion is not reviewable. *Burke v. American Network, Inc.,* 95 Or. App. 274, 277, 768 P.2d 924 (1989).

The bulk of defendants' arguments relate to the trial court's denial of their motions to dismiss on constitutional grounds. Those arguments were not preserved. At the pleading stage, defendants moved to dismiss for failure to state a claim. One of their arguments was that the claims for reckless and negligent[2] selection of an agent were prohibited by the First Amendment and the Oregon Constitution. They did not explain that argument further. The trial court denied the motion.

At trial, the American Civil Liberties Union (ACLU) and the Portland National Lawyer's Guild (NLG) each filed a memorandum and presented oral argument to the court addressing the free speech considerations raised by the pleadings. The ACLU raised constitutional concerns only about the claim for reckless selection of an agent. The NLG did not assert any constitutional concerns regarding any of the claims.

Defendant Tom Metzger made a constitutional argument about the agency theory of liability and asserted his view that *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), prohibited liability for defendants' conduct. He moved to dismiss the case.

We conclude that defendants did not preserve any claim of constitutional error regarding the two theories of liability for intentional misconduct. Defendants' motion, which followed on the heels of the *amici*'s arguments explicitly conceding the viability of the claims for intentional misconduct, was an adoption of the position stated

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[2] The negligence claim was stricken on plaintiff's motion after the close of his evidence.

by the ACLU. Defendants' argument did not contradict or expand on that position. The trial court specifically ruled only on the motion to dismiss Count II for reckless conduct, which was the issue specifically raised by the ACLU. Defendants did not challenge the court's understanding of the motion by asking for a ruling on the claims for intentional misconduct. The trial court was not asked to rule on a motion to dismiss the claims for intentional misconduct. We do not consider those asserted errors to be errors apparent on the face of the record, and we will not address them. ORAP 5.45(2); *State v. Brown*, 310 Or. 347, 800 P.2d 259 (1990). The only constitutional issues that defendants preserved concern the claim for reckless misconduct.

We need not address those alleged errors. The jury specifically found for plaintiff on two theories of intentional misconduct, in addition to imposing liability for reckless conduct.[3] Even if we were to agree with

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[3] The special verdict form shows the jury's findings:

"*QUESTION NO. 2:* Did one or more of the California defendants – through their agents – substantially assist in, or encourage, the conduct of the Oregon defendants that caused the death of Mulugeta Seraw?

"*ANSWER:* Yes X No _

" * * * * *

"*QUESTION NO. 3:* Were one or more of the California defendants involved in a conspiracy with the Oregon defendants that led to the death of Mulugeta Seraw?

"*ANSWER:* Yes X No _

" * * * * *

"*QUESTION NO. 4:* Did one or more of the California defendants cause the death of Mulugeta Seraw by recklessly selecting or retaining agents to organize

defendants that the recklessness claim is barred by constitutional considerations, the trial court's judgment would nonetheless stand because of the verdict on the other two theories of liability.

Defendants' tenth assignment of error challenges the trial court's ruling that it would not allow testimony or evidence on cross-examination of David Mazzella that he was at a local night club distributing literature and recruiting for the Ku Klux Klan on October 12, after the first day of his testimony in this trial. They assert that "the evidence relating to this event not only tended to impeach some of Mazzella's earlier testimony which suggested, in part, his lack of bias, it also showed, directly and powerfully, Mazzella's bias against [defendants] and his motives for lying about them on the witness stand."

Defendants' failure to make an offer of proof or to inform the court what evidence or testimony they sought to introduce leaves this court without the information needed to consider the assignment.[4] We do not know

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East Side White Pride?
"*ANSWER:* Yes X No _"

[4] Nothing in the portion of the transcript to which defendants refer indicates what witnesses, if any, defendants were prevented from calling, how they could have testified, or what other evidence was excluded because of the trial court's ruling. Tom Metzger told the court that "we will present witnesses" that Mazzella was at the club recruiting for the Klan on October 12. That is the most specific reference to any evidence or testimony that was excluded. Without more, we cannot determine whether the trial court's ruling that it would exclude evidence regarding Mazzella's activities was error, let alone prejudicial error. *See State v. Affeld*, 307 Or. 125, 764 P.2d 220 (1988).

whether defendants had witnesses who could have testified in contradiction to Mazzella's apparent denial that he was at the night club that night. As the Supreme Court recently explained:

> "Adequate offers of proof are required to ensure that appellate courts are able to determine (1) whether it was error to exclude the evidence, and (2) whether any error was likely to have affected the result of the case. *State v. Affeld, supra* [n 4], 307 Or [125] at 128[, 764 P.2d 220]." *State v. Busby,* 315 Or. 292, 298, 844 P.2d 897 (1993).

Here, we cannot determine either, and therefore we cannot say that the court's ruling was in error.

Affirmed.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

ENGEDAW BERHANU, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Plaintiff-Respondent, v. TOM METZGER, individually and as President of the White Aryan Resistance; WHITE ARYAN RESISTANCE, an unincorporated association; JOHN METZGER, Defendants-Appellants, and KENNETH MIESKE and KYLE BREWSTER, Defendants.	Multnomah County Circuit Court No. A8911-07007 CA A67833 SC S40469 **ORDER DENYING RECONSIDERATION**

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

S/W. L. RICHARDSON
WILLIAM L. RICHARDSON
CHIEF JUDGE

September 1, 1993
DATE

c:	Jeffrey Sinensky	Attorney for Plaintiff-Respondent
	J. Richard Cohen	Attorney for Plaintiff-Respondent
	Elden M. Rosenthal	Attorney for Plaintiff-Respondent
	Morris S. Dees	Attorney for Plaintiff-Respondent
	Tom Metzger	*Pro Se* Defendant-Appellant
	White Aryan Resistance	*Pro Se* Defendant-Appellant
	John Metzger	*Pro Se* Defendant-Appellant
	Michael Null	Attorney for Defendants-Appellants

IN THE SUPREME COURT OF THE STATE OF OREGON

ENGEDAW BERHANU, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Plaintiff-Respondent, Respondent on Review, v. TOM METZGER, individually and as President of the White Aryan Resistance; WHITE ARYAN RESISTANCE, an unincorporated association; JOHN METZGER, Defendants-Appellants, Petitioners on Review. and KENNETH MIESKE and KYLE BREWSTER, Defendants.	Multnomah County Circuit Court No. A8911-07007 CA A67833 SC S40469 **ORDER DENYING REVIEW**

The Court has considered the petition for review and ORDERS that it be denied.

DATE: November 16, 1993

/S/WALLACE P. CARSON JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c:	Jeffrey Sinensky	Attorney for Plaintiff-Respondent
	J. Richard Cohen	Attorney for Plaintiff-Respondent
	Elden M. Rosenthal	Attorney for Plaintiff-Respondent
	Morris S. Dees	Attorney for Plaintiff-Respondent
	Tom Metzger	*Pro Se* Defendant-Appellant
	White Aryan Resistance	*Pro Se* Defendant-Appellant
	John Metzger	*Pro Se* Defendant-Appellant
	Michael Null	Attorney for Defendants-Appellants

* * *

[p. 693] think that rapper music is quite the lifestyle of skins. Why do you go to recruit at a rapper club?

MR. DEES: Your Honor, objection. Your Honor, he said he never went to the places.

MR. TOM METZGER: Well, he said he went to there to distribute literature.

Didn't you?

THE WITNESS: Out in front, yes.

BY MR. TOM METZGER:

Q. You have never been inside of the Confetti Club?

A. No, I haven't.

Q. Isn't it true, Mr. Mazzella, that on this very Friday night at 12:00 o'clock to 1:00 in the morning, about 1:00 in the morning –

MR. DEES: What's your question again?

MR. TOM METZGER:

Q. You were in the Confetti Club?

A. No.

Q. And isn't it true that you were recruiting for a klan group in Eugene, Oregon?

A. No, it's not. I'm under 24-hour watch right now.

THE COURT: No. No, he's talking about the night in question, November 12th.

THE WITNESS: Oh. No, I was at Nick Heise's place and we had left a minute before.

[p. 694] BY MR. TOM METZGER:

Q. I'm not talking about the fight now, Mr. Mazzella. I'm talking about this past Friday evening.

THE COURT: Excuse me.

MR. TOM METZGER: Pardon me.

THE COURT: I thought you were referring to November 12th, between midnight and 1:00, when the incident took place?

MR. TOM METZGER: No. I'm sorry, Your Honor, I was not. I was referring to this last Friday night and early Saturday morning.

THE COURT: How would that be relevant?

MR. DEES: I object to relevancy, Your Honor.

MR. TOM METZGER: The relevancy is we will present witnesses, probably later in this trial, that this man, while a star witness –

MR. DEES: Your Honor, I object.

MR. TOM METZGER: Was in that club recruiting for the klan.

MR. DEES: He's going to tell the jury something totally irrelevant. I ask this be heard outside the presence of the jury. This is just a cheap shot.

THE COURT: We are not going to go back and forth, and we won't try and talk over each other.

As to Mr. Mazzella's activities this past Friday [p. 695] night, the Court will sustain that objection, Mr. Metzger. It's not relevant to this. Nor will witnesses be allowed to testify as to Mr. Mazzella's conduct or places he attended here in the last week or so, unless it pertains to a specific statement by Mr. Mazzella that has some reference to this trial.

So, the objection is sustained.

MR. TOM METZGER: Well, the relevancy, Your Honor –

MR. DEES: Can Your Honor take this up outside the presence of the jury? I don't know what this man is trying to pull.

THE COURT: Okay. We should proceed.

MR. TOM METZGER: Your Honor, do we discuss this in your chambers?

THE COURT: Ladies and gentleman, we'll take a recess at this point. At this point in time, again, don't discuss the case. Leave your notebooks on your respective chairs.

* * *

(Whereupon, the following proceedings were had in open court, outside the presence of the jury.)

* * *

THE COURT: Okay. You can step down.

Mr. Metzger.

[p. 696] MR. TOM METZGER: Well, information, Your Honor, far from being the repentant person

that has turned over a new leaf. In fact, Mr. Mazzella is right at this moment active in recruiting for racist groups who we don't know about or which have simply been in the newspaper in the Portland or in the Southern Oregon area, and we have witnesses in this front page article in the Oregonian. He's been IDed. He's been at the club Friday night. Saturday he's there. He approaches people. He has dialogue with them to bring them into the klan, some klan group. The man explains he's thrown out of the club with three other people with him, and Mr. Dees testified and said he was playing cards with the man at 1:00 o'clock in the morning. I think it's very relevant. If this man is running around recruiting, he's supposed to be, number one, a prisoner, anyhow, I think it's very relevant.

THE COURT: Well, the fact that you think it's relevant doesn't get over the fact that I have ruled it's not relevant. Mr. Dees' statements, if you could even get those in, that wouldn't be relevant. So, the point is, as I see the issues for this jury, Mr. Mazzella's presence at a location this past Friday night is not relevant. It has nothing to do with any issue in the case.

The fact that you have been allowed to cross-examine him on his activities in the Southern Oregon area does not give you leeway to present what you believe are his [p. 697] associations here at a club this past Friday night.

So, I'm objecting to that testimony, and I'm sustaining any area of inquiry concerning Mr. Mazzella's presence or location this past Friday evening.

MR. TOM METZGER: Can I say one more thing, Your Honor?

THE COURT: You may.

MR. TOM METZGER: It goes to motive. If we have shown that Mr. Mazzella was, in fact, a member of the American klan and an organization of Modesto, California, carried application forms to Oregon when he came here to attempt to sign up people in that American klan and then, during the very time that he's giving testimony, he's out recruiting for that klan, it shows motive of a klan group that also would be thrilled to death if Tom Metzger and John Metzger were ruined civilly.

THE COURT: Anything by plaintiffs?

MR. DEES: Your Honor, he fully explored that on direct with Mr. Mazzella, his past role with every organization. I object strenuously. I believe the Court has ruled.

THE COURT: Okay.

We'll take a ten minute recess at this point in time. The Court will be in recess.

* * *

[p. 736] identification at this time on the letter itself, and I will staple it and give it to the Court to be marked for identification.

THE COURT: Very well.

Now, if either side wishes a copy of this letter, I don't know if you still retain a copy or do you want a copy so that you can use it for preparation, we can make copies of the original letter for both sides.

MR. DEES: That would be helpful for both sides before lunch.

THE COURT: Before lunch, Mr. Dees?

MR. DEES: Well, yes, we'll do it.

THE COURT: I prefer the clerk to do it.

MR. DEES: Okay. Thank you, sir.

THE COURT: We'll make copies, one, two, three copies of Exhibit 146.

All right. Anything further?

MR. TOM METZGER: No.

THE COURT: The Court will be in recess. 1:30.

* * *

(Whereupon, lunch recess was taken.)

* * *

THE COURT: Okay. You can be seated.

MR. TOM METZGER: Your Honor, can I address you before you bring in the jury? I wasn't quite understanding [p. 737] before we took the morning break, and I explained my reasoning for relevancy from the membership in the klan to the witnesses saying that Mr. Mazzella had attempted to sign up people in the klan up here, and the allegations then that the witness over this last weekend was attempting to sign up people in the klan at the Confetti Club, and how I didn't think – I thought you were going to go back and think about that the relevancy of it, and I'm not clear on what position you're taking.

THE COURT: Okay.

If I understand the nature of your question, Mr. Metzger, it arises from the article that was in the morning Oregonian concerning Mr. Mazzella's alleged whereabouts this past Friday. That's a problem with newspaper articles, and that's why generally they are excluded. The Court considered the sources of your question, in light of the fact that Mr. Dees' purportedly indicated that the witness could not have been there.

Now, the problem we have with that area of inquiry is this. It's collateral to this trial insofar as Mr. Mazzella testified he's never been inside of the Confetti Club, and your wanting to impeach his testimony on something that I just deemed to be irrelevant, whether he was there this past Friday.

If you had evidence that would contradict Mr. Mazzella's whereabouts on the evening in question, then it [p. 738] might be an appropriate area of inquiry. But here, now almost two plus years later, I don't think it's relevant for this jury to have to decide whether or not that newspaper article is, in fact, true or false.

He denied that he was involved with organizing the klan in Southern Oregon. Now, he's made that statement and denied that, and again you're trying to impeach his testimony with something collateral to this trial. So, that's why I ruled it would not be admissible. I did not necessarily say it was not relevant. I just said it would not be admissible.

MR. TOM METZGER: Well, there again, I would simply, going to motive, that the witness had other

motives, totally different motives possibly there, other than he was a member. He did establish he was a leader in this klan. He came up. He tried to sign up people in it. And then we have the allegations of the further klan activity, that this man could be coming from a position of this klan group, is attempting, as the plaintiffs, to financially destroy Tom Metzger. That's what I was getting at.

THE COURT: And he has answered that question insofar as his understanding of whatever. He said he didn't know what your financial wealth was. So, he didn't know whether the plaintiffs were intending to destroy you financially or not.

But the area of inquiry, at this time, the Court [p. 739] deems it's collateral to the issues in the case, especially in light of the fact that Mr. Mazzella has denied any further involvement with any group. And that's why I ruled that you could not seek to impeach his testimony with, one, the newspaper article of any witnesses that purportedly saw him in the Confetti Club this past Friday or Saturday.

MR. TOM METZGER: I understand, Your Honor, but I do object for the record.

THE COURT: Your record is noted – excuse me, your objection is noted.

Okay. Anything further?

MR. DEES: No, Your Honor.

THE COURT: Okay.

Mr. Mazzella, you can retake the stand.

* * *

(Whereupon, the following proceedings were had in open court, in the presence of the jury.)

* * *

THE COURT: John Metzger, you may continue.

BY MR. JOHN METZGER:

Q. Mr. Mazzella, when did Aryan Youth Movement change its name to White Aryan Resistance Youth?

A. I believe it was 1986.

Q. 1986?

A. I believe so.